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No. 89-

IN THE

Supreme Court of the United States

OCTOBER TERM 1989

EMMA TAYLOR, *et al.*,

Petitioner,

v.

GENERAL MOTORS CORPORATION,

Respondent.

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

In asserting that all common law claims are not preserved under The Act, notwithstanding the fact that preservation is expressly reflected in 15 U.S.C. § 1397(c), Respondents all but concede that the issues presented in this petition constitute an important federal question. In addition, courts in applying numerous other FMVS standards in state common-law tort actions have found no preemption of state law bottomed design claims, as did the court below.

The court below incorrectly construed the import of 15 U.S.C. § 1397(c), ignored the presumption against preemption applicable in cases such as this, and further based its holding on precedent inapposite to the facts of the case at bar. Review is necessary by this Court.

Respondents' chief arguments are addressed below.

1. A presumption against preemption applies to implied preemption analysis arising from a perceived conflict between state and federal law.

Respondent GM contends that when there is a direct conflict between state and federal law, consideration of congressional intent to preempt is unnecessary because the Supremacy Clause automatically dictates that the conflicting state law must fall. GM's Brief at 7. Implied preemption analysis is not applied in the mechanical fashion proposed by GM as is evidenced by prior holdings of this Court.

That there is a presumption that state regulation of matters related to health and safety is not invalidated by the Supremacy Clause where there is a perceived conflict with federal law was clearly expressed by the court in *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707 (1985), wherein it was said:

> Where... the field that Congress is said to have preempted has been traditionally occupied by the states 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' (citations omitted).
>
> . . .
>
> Of course, the same principles apply where, as here, the field is said to have been preempted by an agency, acting pursuant to congressional delegation. Appellee must thus present a showing of implicit pre-

> emption of the whole field, *or of a conflict between a particular local provision and the federal scheme, that is strong enough to overcome the presumption that state and local regulation of health and safety matters can constitutionally coexist with federal regulation.*

Id. at 715-716. (Emphasis supplied). *See Also Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117, 127 (1973) (''Our analysis is...to be tempered by the conviction that the proper approach is to reconcile 'the operation of both statutory schemes with one another rather than holding one completely ousted.'''') *California Federal Savings & Loan Association v. Guerra*, 479 U.S. 272, 288 (1987) (state laws requiring employers to provide leave to pregnant workers not in conflict with Pregnancy Discrimination Act, 42 U.S.C. 2000 e(k), where Congress ''failed to evince the requisite 'clear and manifest purpose' to supersede them''); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984) (where congress assumed that injured persons were free to utilize existing state tort law remedies, party contending that such remedies were impliedly preempted had ''burden to show that Congress intended to preclude such awards''); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 132 (1978) (Court reluctant to infer preemption, especially where basic purposes of the federal and state law are the same).

The Court in *Hillsborough County* concluded that no conflict existed between county ordinances and federal regulations regulating plasma procedures in light of the presumption against preemption, where there was a clear indication by the regulatory agency not to preempt, the regulations set minimum safety standards and additional local requirements were contemplated.

GM's proposed mechanical application of the Supremacy Clause to strike down state law that allegedly conflicts with federal law ignores the premise of preemption analysis which is to "ascertain the intent of Congress". *California Federal Savings & Loan Association v. Guerra*, 479 U.S. at 280. As held in *Silkwood*, *Supra*, where Congress has intended and allowed tension to exist between state and federal regulatory schemes, the Supremacy Clause will not invalidate the state law. The existence of an actual or perceived conflict is but one aspect of implied preemption analysis. If such conflict is found to exist, the focus then shifts to whether it was intended by Congress. GM ignores this final and ultimate consideration.

The application of this principle is further reflected in *Fidelity Federal Savings and Loan Association v. de la Cuesta*, 458 U.S. 141, 154 (1982), wherein the issue was "whether the Board meant to pre-empt California's due-on-sale law", notwithstanding the existence of an unequivocal conflict between federal and state law. The *de la Cuesta* Court, after extensive consideration of the Board's intent in passing the regulation at issue, held that "the Boards due-on-sale regulation was meant to pre-empt conflicting state limitations on the due-on-sale practice of federal savings and loans, and that the California Supreme Court's decision in Wallenkamp creates such a conflict." 458 U.S. at 159. If Respondents' position were correct here, the Court's consideration of intent in *de la Cuesta*, as well as in other cases cited by Respondent wherein actual conflict between state and federal law was found or considered, was for naught. *See, e.g., California Federal Savings & Loan Association v. Guerra*, *Supra*, (intent not to supercede state antidiscrimination laws); *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987) (whether Congress intended to preempt private common law water pollution

nuisance suit based on law of state where injury occurred when source of pollution is located in another state); *Brown v. Hotel & Restaurant Employees and Bartenders International Union*, 468 U.S. 491 (1984) (no actual conflict between state and federal regulation of casino industry union officials, absent specific congressional intent to preclude state regulation); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978) (congressional intent to promulgate uniform national standards for the design and construction of tankers).

This analysis of intent has resulted in holdings that Congress either expressly or impliedly considered state regulations as not conflicting with federal law, or that such conflict was ordained by the specific federal regulatory scheme at issue. *See, e.g. Goodyear Atomic Corp. v. Miller*, 108 S.Ct. 1704 (1988); *Silkwood v. Kerr-McGee Corp., Supra*; *Hillsborough County v. Automated Medical Laboratories, Inc., Supra*; *California Federal Savings & Loan Association v. Guerra, Supra*; *Pacific Gas & Electric Co. v. Energy Resources Conservation & Development Commission*, 461 U.S. 190 (1983). Such is the only intent to be gleaned from Congress in the instant case, especially in light of Congress' express determination to allow its regulatory scheme to be supplemented by state common law.

Since the touchstone of implied preemption analysis is intent and the operation of the state and federal schemes should be reconciled if possible, the presumption against preemption should apply equally to all preemption analysis, express or implied.

Respondents' arguments that the Supremacy Clause should automatically oust state common law also ignores the seminal question of whether there is an "irreconcilable conflict between the federal and state standards." *Silkwood v. Kerr-*

McGee, 464 U.S. at 256. No such irreconcilable conflict exists in the case at bar between the statutory scheme of Congress establishing minimum motor vehicle safety standards and the application of state law which was intended by Congress to supplement the scheme as evidenced by Section 1397(c).

Moreover, both the federal regulations and state common law can operate without impairing the primary objective in enacting the legislation which was to "reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents." 15 U.S.C. § 1381. This objective is supported rather than impaired by common law which further militates against a finding of implied preemption.

Respondent Honda admits that safety was the primary goal of Congress and that uniformity of standards is a "subsidiary" purpose. Honda's brief at pp. 12, 14. Any perceived intent of flexibility in exercising options under FMVSS 208 is also a subsidiary purpose. A state law that is contrary to subsidiary purposes will not be preempted if the state law furthers the primary purpose of the federal statute and is consistent with a savings clause granting authority to the state in an area traditionally regulated by states. *International Paper Co. v. Ouellette*, 479 U.S. at 505 (Brennan, concurring in part and dissenting in part, citing *Pacific Gas & Electric Co. v. Energy Resources Conservation and Development Commission*, 461 U.S. 190 (1983)). This principle should apply squarely to the case at bar.

Respondent Honda asserts that the court below put the savings clause of Section 1397 into its "proper perspective". Honda' Brief at p. 15. The Supreme Court has found savings clauses inapplicable only when the state remedy would be "absolutely inconsistent" with the provisions of an act. *See, e.g., Texas & Pacific Railway Co. v. Abilene Cotton Oil Co.*, 204

U.S. 426, 446 (1907). As discussed above, the savings clause here evidences Congress' intent that state common law supplement the standards promulgated under the Act, and that the application of this regulatory scheme is not "absolutely inconsistent" with the Act nor does it destroy or undermine its primary goal.

Respondents attempt to enhance the alleged conflict between FMVSS 208 and state common law by asserting that FMVSS 208 is somehow unique from other motor vehicle safety standards. They contend that FMVSS 208 is a design rather than a performance standard which involves the exercise of choices. FMVSS 208 is not a pure design standard. Although it sets forth the nature of passenger restraints that may be utilized in a passenger vehicle, it does not dictate a particular design to be chosen by a manufacturer. In this regard, FMVSS 208 is not unlike all other motor vehicle safety standards which expressly or impliedly influence the design of a particular aspect of a product so as to comply with particular performance criteria. Other standards specifically set forth design criteria. *See, e.g.*, 49 C.F.R. § § 571.108, 109, 111 and 202. *See generally* 49 C.F.R. § 571.101 *et seq.*

Similarly, all federal motor vehicle safety standards expressly or impliedly involve "options" in the determination of the design choices that meet performance criteria. This fact has never been used to immune a manufacturer that utilizes a particular design choice that complies with minimum performance criteria from tort liability. Indeed, Congress intended through Section 1397(c) to insure that "compliance with safety standards is not to be a defense or otherwise to affect the rights of parties under common law particularly those relating to warranty, contract, and tort liability." H.R.Rep.No. 1776, 89th Cong. 2d Sess. 24 (1966). This express intent of Congress has been upheld by courts finding that compliance with these

minimum safety standards does not exempt a manufacturer from common law liability. *See, e.g., Shipp v. General Motors Corp.*, 750 F.2d 418 (5th Cir. 1985); *Dawson v. Chrysler Corporation*, 630 F.2d 950 (3d Cir. 1980).

Respondents have put forth no sound reason why the minimum safety standards set forth in FMVSS 208 should be treated differently than any other. Congress, in enacting Section 1397(c), made no distinction between design or performance standards and stated its clear intent that "compliance with *any* federal motor vehicle safety standard issued under this subchapter does not exempt *any* person under common law." 15 U.S.C. § 1397(c) (Emphasis supplied).

Moreover, GM's contention that the minimum standards language in the Safety Act has nothing to do with common law or preemption again ignores the express intent of Congress in Section 1397(c) to condone the supplementation of the standard's minimum requirements by applicable common law. There is no intent expressed by Congress to treat FMVSS 208 any different than any other standard promulgated under the Act, and Respondents arguments do not provide any logical basis why it should be.

2. *de la Cuesta* is inapposite to the case at bar.

Respondent Honda argues that application of state law stands as an obstacle to the supposed "flexibility" granted to manufacturers under FMVSS 208.

As discussed above, any perceived flexibility purpose in the promulgation of FMVSS 208 is a subsidiary purpose which should not stand as an obstacle to furthering the primary purpose of congressional intent.

Unlike this case, the Court in *de la Cuesta* was faced with a direct prohibition by the state which directly conflicted with

the primary and stated purpose of the Board in enacting the regulation. The state common law decision in *de la Cuesta* constituted a direct prohibition of the very activity that the Home Loan Bank Board allowed under the regulation. The operation of state common law in the instant case does not constitute a direct prohibition of any action authorized by the regulatory agency.

Furthermore, the Board in *de la Cuesta* was given plenary power to regulate the matters at issue there unlike the instant case where Congress clearly intended to allow operation of federal regulation and state common law. The same plenary authority was vested in the federal agencies in *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), *Chicago & N.S. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981), and *Local 926, Int'l Union of Operating Engineers v. Jones*, 460 U.S. 659 (1983), cited by GM.

This Court has recognized that direct regulatory authority by state law similar to that at work in the cases cited by Respondents may not be acceptable, but incidental regulatory pressure is acceptable where Congress has so determined. *See, Goodyear Atomic Corporation v. Miller*, 108 S.Ct. 1704 (1988). The action by the state court in *de la Cuesta* constituted direct regulatory authority over the actions of the Board, whereas the role of common law in the instant case simply is an incidental regulatory pressure envisioned and authorized by Congress.

State common law does not prohibit any manufacturer from choosing one of the three methods of compliance provided under FMVSS 208. However, Section 1397(c) provides that whatever method a manufacturer utilizes to comply with the standard, it will not be immune from common law tort liability. Common law does not directly prohibit a manufacturer from

complying with FMVSS 208 in any manner it chooses, nor does it punish the manufacturer for doing what the standard authorizes. It punishes the manufacturer for failing to do more than the minimum standard requires, which is no different than the basis of common law liability against manufacturers notwithstanding compliance with other federal motor vehicle safety standards. The court below incorrectly relied upon *de la Cuesta* to reconcile the peculiar issues involved here, and for that reason this Court should grant review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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